



STATE OF NEW JERSEY
Board of Public Utilities
Two Gateway Center
Newark, NJ 07102
www.bpu.state.nj.us

MARK AND ANDREA NEWTON)	<u>CUSTOMER ASSISTANCE</u>
)	
PETITIONERS,)	
)	<u>ORDER ON REQUEST FOR</u>
v.)	<u>INTERLOCUTORY REVIEW</u>
)	
PUBLIC SERVICE ELECTRIC AND)	BPU Docket No. EC06070563U
GAS COMPANY,)	OAL Docket No. PUC 011000-2006N
)	
RESPONDENT.)	

(SERVICE LIST ATTACHED)

BY THE BOARD:

Before the Board of Public Utilities ("Board") is a request for interlocutory review, pursuant to N.J.A.C. 1:14-14.10 et seq., by Mark and Andrea Newton ("Petitioners"). The Petitioners seek interlocutory review of Administrative Law Judge ("ALJ") Walter M. Braswell's January 10, 2007 Order limiting Petitioners' request regarding discovery to be responded to by Public Service Electric and Gas Company ("Respondent") pertaining to diversion of service issues occurring subsequent to October 2005 and not for the period commencing prior thereto. The Petitioners request that the Board grant review of and overrule ALJ Braswell's Order to allow the Petitioners to seek discovery from Respondent for the period beginning January 2002 to show that the issue is for an on-going diversion of service and not a diversion for a different period of time. Respondent opposes the Petitioner's request for interlocutory review.

This matter was received by the Board on April 4, 2007. Respondent's response was received on April 18, 2007. On May 8, 2007, the Board ordered an extension of the time in which to conduct a complete review of the Petitioners' submission and Respondent's response and to decide whether to conduct an interlocutory review by twenty (20) days, and the Director of the Office of Administrative Law concurred. The Board also requested a certified copy of the sound recording of the proceeding at the Office of Administrative Law ("OAL") pursuant to N.J.A.C. 1:1-14.10(f) which was not received. Based on the need to review the sound recording in order to complete review of the Petitioners' submission and Respondent's response, the Board ordered a relaxation of the procedural rules to prevent unfairness or injustice pursuant to N.J.A.C. 1:1-

1.3(b) so as to extend the time in which to decide whether to conduct an interlocutory review, and the Director of the Office of Administrative Law concurred. The sound recording of the ALJ's ruling was received on June 6, 2007.

BACKGROUND

On June 3, 2005, Petitioners filed an Order to Show Cause and Verified Complaint against Respondent in the Superior Court of New Jersey, Chancery Division, Essex County, alleging that Respondent had failed to investigate a diversion of utility service at their residence. Petitioners alleged that as a result of the diversion Respondent had billed them for utility service consumed by other tenants and the landlord at the property. In response to the Order to Show Cause, Respondent filed the Certification of Harry Jackson, Supervisor for Respondent, which states that the diversion had been corrected. On September 8, 2005, the Honorable Donald J. Volkert, Jr., J.S.C. ordered Respondent to close the Petitioners' utility account, which was the focus of the diversion of service allegation, and open a new account, and ordered the Petitioners to make all payments on the new account in a timely manner.

The Petitioners did not pay their bills going forward, and were subject to discontinuance of utility service (Respondent's Letter Brief dated April 17, 2007, p. 2). On April 17, 2006, Petitioners filed a second Order to Show Cause against Respondent seeking to avoid discontinuance of their service. On June 8, 2006, before the Honorable Kenneth S. Levy, J.S.C. Petitioners alleged that a diversion of service was occurring at their residence. On June 22, 2006, Judge Levy ordered that the matter "is hereby transferred to the Board of Public Utilities as a result of primary jurisdiction as to the diversion of service issue alleged by the Plaintiffs to have occurred subsequent to October 2005" and ordered Respondent to make the application necessary to transfer the matter to the Board.

On July 28, 2006, Respondent submitted a letter application to Board Secretary, Kristi Izzo, transferring the diversion of service issue to the Board for resolution and included a letter Respondent had sent to Judge Levy on May 11, 2006. In the letter to Judge Levy, Respondent stated that Petitioner had filed a bankruptcy petition on October 31, 2005 and that Respondent had "written off to bankruptcy" all amounts owed to Respondent for utility services provided prior to October 31, 2005. Respondent also stated that Petitioners are responsible for payment of all amounts due for utility service provided post-petition.

The Board transmitted this matter to the Office of Administrative Law ("OAL") for hearing and initial disposition as a contested case pursuant to N.J.S.A. 52:14-B-1 et seq. and N.J.S.A. 52:14F-1 et seq. In connection with the hearing at the OAL, Petitioners issued a subpoena to Respondent requesting "a complete printout, and history of the monthly bills, inclusive of the amounts charged for electricity, gas, and any other charges" for tenants residing in Petitioners' apartment building from January 2002 to present. Respondent opposed the production of materials prior to October 2005, the date set forth in Judge Levy's Order. On January 10, 2007, ALJ Braswell directed Respondent to respond to the discovery requests, "but only in so far as the discovery pertains to service issues alleged by Petitioners to have occurred subsequent to October 2005."

On April 4, 2007, the Board received a request from Petitioners for interlocutory review of ALJ Braswell's January 10, 2007 Order denying Petitioners' request regarding discovery served on Respondent for the period commencing January 2002.

On April 18, 2007, Respondent submitted its opposition to the Petitioners' request for interlocutory review of ALJ Braswell's Order.

ALJ'S ORDER AT ISSUE

By a Scheduling Order dated January 10, 2007, ALJ Braswell ordered Respondent to respond to the discovery previously filed by the Petitioners "but only insofar as the discovery pertains to service issues alleged by the Petitioners to have occurred subsequent to October 2005." The ALJ also ordered Petitioners to contact his office to inform him when Respondent could gain access to Petitioners' apartment to conduct a test for the diversion occurring subsequent to October 2005.

PETITIONERS' REQUEST FOR INTERLOCUTORY REVIEW

By their April 4, 2007 application, the Petitioners request that the Board grant interlocutory review of ALJ Braswell's January 10, 2007 ruling in which the ALJ limited discovery to service issues alleged by Petitioners to have occurred subsequent to October 2005. Petitioners argue that the issue before the Board is one diversion of service and not two diversions for separate periods as alleged by the Respondent. They also argue that Respondent's closure of one account, and establishing of a new account does not resolve or cure the diversion of service because the commingled wiring and malfunctioning electrical meters have never been repaired.

RESPONDENT'S POSITION

On April 18, 2007, Respondent submitted opposition to the Petitioner's request for interlocutory review of ALJ Braswell's Order dated January 10, 2007. Respondent argues that the discovery order must not be reviewed because the request for interlocutory review is untimely. Petitioners failed to provide Respondent with proper notice of their request within the proper time period. The Uniform Administrative Procedure Rules, which apply to all State Agency contested cases, require that a brief be served on the opposing party's attorney. N.J.A.C. 1:1-7.1. Further, Respondent argues that N.J.A.C. 1:1-14.10(b) requires that "[a]ny request for interlocutory review shall be made to the agency head and copies served on all parties." Service should take place "no later than five working days from the receipt of the written order or oral ruling, whichever is rendered first." N.J.A.C. 1:1-14.10(b). Respondent states that of the date of filing its letter brief in opposition, it had not received notice of Petitioners' request and has relied on copies of documents supplied by the Department of Law and Public Safety in developing its response.

Respondent also argues that if the ALJ's Order is reviewed by the Board, Petitioners' request to expand the scope of discovery should be denied because a review of the record indicates that the "first" diversion of service issue was resolved in September 2005 when Judge Volkert found that the diversion of service had been corrected and ordered that Petitioners pay their bills from October 2005 forward. Respondent contends that thereafter, at oral argument before Judge Levy on April 17, 2006, the Petitioners alleged that a diversion of service was occurring at their residence. Finding an alleged diversion of service over which the Board had primary jurisdiction, Judge Levy transferred the matter to the Board, and the Board sent the contested case to the OAL for a hearing. Respondent asserts that the issue of expansion of Judge Levy's Order has been addressed by ALJ Braswell and that the ALJ directed Respondent to respond to discovery requests, but only in so far as the discovery pertained to service issues alleged by Petitioners to have occurred subsequent to October 2005. Respondent asserts that Petitioners filed an untimely motion in Superior Court seeking reconsideration of Judge Levy's Order in an

effort to evade ALJ Braswell's Order. Respondent states that on March 16, 2007, at oral argument on the motion before the Honorable Renee J. Weeks, J.S.C., the Judge denied Petitioners' request to expand the scope of discovery prior to the October 2005 time period.

Respondent argues that allowing Petitioners to expand the scope of the ALJ's Order would effectively be a modification of Judge Levy's Order and that Judge Weeks has already ruled on reconsideration of the time period set forth in Judge Levy's Order and her ruling is res judicata on the issue of expansion of the scope of the Order. Respondent also argues that Judge Levy transferred only the issue of alleged diversion of service occurring after October 2005 to the Board and that ALJ Braswell's Order reflects that fact.

APPLICABLE LEGAL STANDARDS

With certain exceptions not relevant herein, an order or ruling of an ALJ may be reviewed interlocutorily by an agency head at the request of a party. N.J.A.C. 1:1-14.10(a). Pursuant to N.J.A.C. 1:1-14.10(b), any request for interlocutory review shall be made to the agency head, with a copy served on all parties, no later than five working days from the receipt of the written order or oral ruling, whichever is rendered first. Within three days of receipt of a request for interlocutory review, an opposing party may submit an objection to the request. N.J.A.C. 1:1-14.10(b). Pursuant to N.J.A.C. 1:1-14.10(c), within ten days of the request for interlocutory review, the agency head must decide if the order or ruling will be reviewed. With regard to the Board, pursuant to N.J.A.C. 1:14-14.4(a), the Board is to determine at its next regularly scheduled open meeting after expiration of the ten-day period from receipt of the request for interlocutory review whether to accept the request and conduct an interlocutory review. The agency head is to decide the review no later than twenty days from receiving the request for review but the time period for disposition may be extended for good cause for an additional twenty days if both the agency head and the OAL Director concur. N.J.A.C. 1:1-14.10(e). "Where the interests of justice required, the agency head shall conduct an interlocutory review on an expedited basis. Ibid. The OAL's regulations thus provide for a two-step process for ruling on requests for interlocutory review: 1) a ruling on whether or not to grant interlocutory review and 2) if review is granted, a ruling on whether or not to reverse or otherwise modify the ruling at issue.

The legal standard for accepting a matter for interlocutory review is set forth in In re Uniform Administrative Procedure Rules, 90 N.J. 85 (1982). In that case, the Court concluded that the agency has the right to review ALJ orders on an interlocutory basis "to determine whether they are reasonably likely to interfere with the decisional process or have a substantial effect upon the ultimate outcome of the proceeding." Id. at 97-98. The court indicated that the agency head has broad discretion to determine which ALJ orders are subject to review on an interlocutory basis. However, it noted that the power of the agency head to review ALJ orders on an interlocutory basis is not itself totally unlimited, and that interlocutory review of ALJ orders should be exercised sparingly. In this regard, the Court noted:

In this respect, the analogy to the courts is appropriate. In general, interlocutory review by courts is rarely granted because of the strong policy against piecemeal adjudications. See Hudson v. Hudson, 36 N.J. 549 (1962); Pennsylvania Railroad, 20 N.J. 398. Considerations of efficiency and economy also have pertinency in the field of Administrative law. See Hackensack v. Winner, 82 N.J. at 31-33; Hinfey v. Matawan Reg. Bd. Of Ed., 77 N.J. 514 (1978). See infra at 102, n.6. Our State has long favored uninterrupted proceedings at the trial level, with a single and complete review, so as to avoid the possible inconvenience, expense and delay of a fragmented adjudication.

Thus, "leave is granted only in the exceptional case where, on a balance of interests, Justice suggests the need for review of the interlocutory order in advance of final Judgment." Sullivan, "Interlocutory Appeals," 92 N.J.L.J. 162 (1969). These same Principles should apply to an administrative tribunal.

[Id. at 100]

The Court held that in the administrative arena, as in a court case, interlocutory review may be granted "only in the interest of justice or for good cause shown." Ibid. The Court found that an agency has the right to review orders of an ALJ on an interlocutory basis:

whenever in the sound discretion of the agency head, there is a likelihood that such an interlocutory order will have an impact upon the status of the parties, the number and nature of the claims or defenses, the nature or scope of issues, the presentation of evidence, the decisional process or the outcome of the case.

[Ibid.]

DISCUSSION

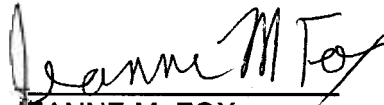
As to the issue of whether or not to grant interlocutory review, the Board notes first that Petitioners failed to request interlocutory review "no later than five working days from the receipt of the written order or oral ruling, whichever is rendered first." N.J.A.C. 1:1-14.10(b). The Board has, however, considered the Motion for Interlocutory Review but is not persuaded that ALJ Braswell's Discovery Order should be reviewed interlocutorily at this juncture. According to the Certification of Harry Jackson, Respondent's Supervisor, the diversion of service occurring prior to October 2005 had been corrected. Subsequently, all amounts owed to Respondent for utility services provided prior to October 31, 2005 were "written off to bankruptcy," and in Respondent's letter to Judge Levy attached to Respondent's July 28, 2006 application to Board Secretary, Kristi Izzo, Respondent states that Petitioner is no longer responsible for payment of these amounts (Respondent's letter to Judge Levy dated May 11, 2006).


Furthermore, ALJ Braswell's Scheduling Order of January 10, 2007 ordered Respondent to respond to the discovery propounded by the Petitioners for service issues alleged by Petitioners to have occurred subsequent to October 2005, and also ordered Petitioners that on or before January 16, 2007 Petitioners were to inform the ALJ when Respondent could gain access to their apartment to conduct a test for diversion of service. The ALJ has provided for testing as to the diversion subsequent to October 2005 which should allow for a review of the issue of diversion transferred by Judge Levy to the Board, i.e., "the diversion of service alleged by the Petitioners to have occurred subsequent to October 2005." As stated above, interlocutory review is to be exercised sparingly and given the other aspects of the ALJ's Scheduling Order, there is not good cause shown to review the ALJ's Discovery Order on an interlocutory basis at this time. While the Board, therefore, finds that interlocutory review should not be granted, the Board notes, however, that N.J.A.C. 1:1-14.10(j)(2) provides that "any order or ruling reviewable interlocutorily is subject to review by the agency head after the judge renders the initial decision in the contested case, even if an application for interlocutory review: [w]as made by the agency head declined to review the order or ruling."

Accordingly, the Board HEREBY DENIES the Petitioners request for interlocutory review of ALJ Braswell's January 10, 2007 discovery ruling.


DATED: 7/12/07

BOARD OF PUBLIC UTILITIES
BY:


JEANNE M. FOX
PRESIDENT


FREDERICK F. BUTLER
COMMISSIONER

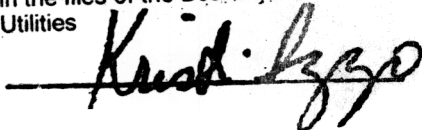

JOSEPH L. FIORDALISO
COMMISSIONER


CHRISTINE V. BATOR
COMMISSIONER

ATTEST:


CARMEN DIAZ
ACTING SECRETARY

I HEREBY CERTIFY that the within
document is a true copy of the original
in the files of the Board of Public
Utilities



I/M/O MARK AND ANDREA NEWTON
V.
PUBLIC SERVICE ELECTRIC AND GAS COMPANY
BPU Docket No.EC06070563U
OAL Docket No.PUC 11000-2006N

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